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COMMUNICATION FROM THE PERMANENT MISSION OF MEXICO TO THE UNITED NATIONS OFFICE AND OTHER INTERNATIONAL ORGANIZATIONS IN GENEVA

Note by the UNCTAD secretariat

The attached text is circulated as an official document of UNCTAD at the request of the Permanent Mission of Mexico to the United Nations Office and Other International Organizations in Geneva in connection with the UNCTAD secretariat report entitled "Empirical evidence of the benefits from applying competition law and policy principles to economic development in order to attain greater efficiency in international trade and development" (TD/B/COM.2/EM/10), which served as the basis for the deliberations of the Expert Meeting on Competition Law and Policy, held from 24 to 26 November 1997.

GE.98-50080 (E)

Mexico City, 15 December 1997

Comments by the Federal Commission on Competition on reference No. 73 in the UNCTAD study entitled "Empirical evidence of the benefits from applying competition law and policy principles to economic development in order to attain greater efficiency in international trade and development", submitted to the Expert Meeting on Competition Law and Policy, held from 24 to 26 November

The passage in question reads as follows:

"In Mexico, although the competition law has been in force since 1993, the activism of the competition authority has already had a great impact on the general attitude and approach to doing business in Mexico. It has been suggested, however, that there are large loopholes and missing rules in the competition law relating to exemptions in respect of 'relative monopolistic practices' (subject to case-by-case evaluations rather than absolute prohibitions), and particularly relating to due process and clarity in investigation proceedings."

Comments

The comments are divided into three sections. The first section contains an analysis of the treatment of relative monopolistic practices in the LFCE, with other legislation taken into account, while the second section describes the remedies that the LFCE offers to individuals for the reconsideration of decisions and the action taken by the Commission with regard to transparency in its procedures. The third section contains conclusions.

I. Treatment of relative monopolistic practices in the LFCE and other legal instruments

In commenting on the assertions made concerning relative monopolistic practices, mention should first be made of the fact that article 10 of the LFCE describes as relative monopolistic practices acts, contracts, agreements or arrangements whose purpose or effect is or may be to improperly displace other agents from the market, significantly obstruct their access or establish exclusive advantages in favour of one or more persons, in the following cases:

(i) Exclusive distribution of goods or services, market segmentation and agreements not to produce or distribute goods or to provide services.

(ii) Action by a producer to impose a sales price on his distributors or suppliers.

(iii) A sale or transaction made conditional on the purchase, sale or provision of another good or service on a basis of reciprocity.

(iv) A sale or transaction made subject to the condition that the goods or services produced, processed, distributed or marketed by a third party may not be used or acquired, sold or supplied.

(v) Unilateral action involving a refusal to sell or supply to specific persons goods or services which are available and normally offered to third parties.

(vi) Concerted action among several economic agents or an invitation to them to exert pressure against a certain customer or supplier, with the aim of dissuading him from certain behaviour, applying reprisals or forcing him to act in a certain manner.

(vii) Generally speaking, any act that improperly harms or hinders the process of free competition in the production, processing, distribution and marketing of goods or services.

Article 11 provides that, in order for these types of behaviour to be considered as offences under the LFCE, the alleged offenders must possess substantial power in the market in question. The criteria applied to identify the market in question and substantial power in such a market are not arbitrary, but are defined in articles 12 and 13 respectively.

The requirement that the alleged offenders should possess substantial power in the market in question is applied in determining whether the behaviour in question was unlawful in order to distinguish between types of behaviour in which the restraints referred to might be intended to enhance efficiency and those in which an attempt is being made to abuse market power, either to set sales prices (point II) or to exclude competitors (points I, III, IV, V and VI), or unspecified behaviour of a more general nature (point VII). 1/

If unlawful practices are those which involve substantial power in the market in question, a case-by-case evaluation of the type of behaviour in question becomes necessary. Thus the LFCE avoids placing a ban on restraints imposed by enterprises which have no power in the market in question and which are endeavouring to increase their competitive advantages in the light of market conditions.

In this regard, the treatment of relative monopolistic practices under the LFCE contrasts with that given to absolute monopolistic practices in that the latter, by encompassing agreements between competitors, always have anti-competitive effects, so that they are prohibited without the need to conduct any investigation into the market power of the participants.

In the conventional language of competition policy, the evaluation of the pro-competitive and anti-competitive effects of specific types of behaviour in order to determine whether they are lawful has been termed the "rule of reason", while practices whose effects are always anti-competitive are simply prohibited.

The application of the "rule of reason" has evolved on the basis of practical experience, and also advances in economic analysis. In relation to the latter aspect, it has been demonstrated that in competitive markets many vertical restraints develop which stem from considerations of efficiency and the protection of intellectual property rights, which in addition contribute to greater investment, technological innovation and hence greater development of markets. 2/ It is sufficient for this purpose to observe the rapid

progress in terms of benefits to consumers produced by systems of competition which make extensive use of vertical restraints such as franchises, whose effects in reducing costs arising from integration are of great significance, or systems of exclusive distribution, which safeguard enterprises' promotional costs.

The application of the "rule of reason" in the case of relative monopolistic practices is not exclusive to Mexico, but has been raised, inter alia, in legislation in Canada and the United States and in the European Union's Treaty of Rome. Among the areas covered are exclusive distribution, exclusive territories and discriminatory and predatory pricing. Only the imposition of sales prices, refusal to deal and collective boycotts are prohibited per se in some of this legislation. 3/

In order to illustrate the purpose of the rule of reason, it is of interest to examine the competition criteria which are applied in the European Union's competition legislation. Article 85 prohibits agreements between undertakings as well as decisions by associations of undertakings and concerted practices which may affect trade between member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, including agreements which incorporate restrictions that make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. However, the third section of article 85 raises the possibility of exempting any such agreement which "contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

"(a) Impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

"(b) Afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

Clearly, in allowing for the possibility of exemptions from prohibitions on behaviour it is acknowledged that in some cases the agreements in question have pro-competitive effects which should not be penalized under the law. In this regard, article 85 of the Treaty of Rome, like article 10 of the LFCE, provides for evaluation of the effects of a specific type of behaviour on competition in determining whether or not it is lawful. Article 86 prohibits any abuse of a dominant position in the market by one or more undertakings, so that an analysis of the market power of the agents involved is required before the lawfulness of the behaviour in question can be determined. This analysis covers ground similar to the criterion of substantial power laid down in the LFCE for evaluating relative monopolistic practices.

In contrast to the Treaty of Rome, Mexican law does not take account of explicit objectives relating to technical progress, or the manner in which the benefit is fairly shared, in the context of the evaluation of relative monopolistic practices. However, it is fully compatible with the European Union's criteria in evaluating restraints which improve the production and distribution of goods, thus generating a benefit for consumers.

In view of the above, the provisions of the LFCE relating to determination of the lawfulness of practices in respect of which the agents do not possess market power are compatible with international legislation in this field and cannot be viewed as a loophole since in every case the effect of the practices in question on the process of competition is evaluated, and a prohibition is placed only on those types of behaviour that harm that process, which the Act is designed to protect.

II. Procedures and transparency in the LFCE

As for the procedure laid down in the LFCE, article 30 provides that it can begin with an ex officio investigation or one requested by a party. In either case "protection of the process of free competition entails observance of all the formalities gathered together in what are known as legal safeguards, considered as a right of the individual and an obligation of the authorities, where the goods or the rights of the individual are affected or he is deprived of them". 4/

The essential formalities in the procedure are those which guarantee appropriate and timely defence prior to the prohibition. In other words, it is necessary to respect the right to a hearing laid down in article 14 of the Constitution, which grants Mexican subjects the opportunity to present a defence. For this purpose it imposes on the authorities, among other obligations, that of fulfilling the essential formalities in the procedure during the case. These are those which are necessary in order to guarantee an appropriate defence before the act of prohibition, taking the form, broadly speaking, of the following requirements: (1) notification of the start of the proceedings and the consequences thereof; (2) opportunity to offer and present the evidence constituting the defence; (3) opportunity to put forward arguments; and (4) the handing down of a decision which settles the issues raised. 5/

These four requirements are set out in article 33 of the LFCE, which provides that:

" ... proceedings before the Commission shall be conducted as follows:

"(i) The alleged offender shall be summoned and informed of the subject matter of the investigation. A copy of the complaint shall be attached where appropriate;

"(ii) The alleged offender summoned shall be granted a period of 30 calendar days to make his or its case and add such documentary proof as may be in his or its possession and offer conclusive evidence;

"(iii) Once the evidence has been presented, the Commission shall set a deadline no more than 30 calendar days distant for the oral or written presentation of submissions;

"(iv) Once the proceedings have been completed, the Commission shall hand down a decision within a period which shall not exceed 60 calendar days."

In its actions the Commission must comply with the obligations imposed on it under article 16 of the Constitution in connection with the rule of law, so that any decision handed down by the Commission must be well-founded and duly substantiated. "The Commission has fulfilled these obligations in its work and to date no judicial authority has ordered reconsideration of any proceedings". 6/

Regarding the possibility of challenging the Commission's decisions, article 39 of the LFCE provides for an "application for reconsideration" before the Commission itself, for the purpose of securing the annulment, modification or confirmation of its decisions. When such an application is made, the execution of the decision being challenged is suspended. Under the Act, the Commission has a period of 60 days from the lodging of the application to take a decision and notify the applicant. Silence on the part of the Commission means that the decision being challenged is confirmed.

Once this remedy has been exhausted, individuals may challenge the Commission's decisions by appealing to the Federal Fiscal Administrative Court or by an amparo application to the Federal courts.

As a reflection of the experience of the Commission, it should be mentioned that the proportion of decisions that have been modified or annulled, either by the Commission itself or by the appropriate authorities (the Federal Fiscal Administrative Court, district courts or the Supreme Court) has been very low. 7/ The following statistics are worthy of note:

Among the 584 cases of mergers and monopolistic practices settled between the time the LFCE entered into force in July 1993 and December 1996, 83 appeals were lodged, 12 of which culminated in the annulment of the decisions and 6 in a modification. 8/ It is also important to mention that the proportion of applications for reconsideration received in relation to the number of cases dealt with has fallen substantially, indicating better understanding by economic agents of the procedures applied by the Commission. In this way, between July 1995 and July 1996, 217 cases of mergers and monopolistic practices were heard, together with 35 applications for reconsideration (16.12 per cent of the total), while in the second half of 1996 157 cases were heard and 12 applications for reconsideration (7.6 per cent). 9/

The Commission is also making continuing efforts to raise the level of transparency in relation to the criteria applied under the Act. Of particular note are its annual reports, containing summaries of the cases heard. Also in pursuit of the objective of transparency, active use is made of the Commission's Internet page, which features the criteria approved by the full Commission on various matters as well as summaries of the decisions adopted. Events aimed at the public in general and the business sector in particular have also been organized as a means of promoting competition policy in Mexico.

III. Conclusions

On the basis of the above considerations we consider that the reference in the report contains tendentious information since it does not explain the criteria used by the LFCE to determine the lawfulness of relative monopolistic

practices and their analysis case by case, especially those involving the existence of substantial power in the market in question and the elements taken into account in evaluating such situations. Furthermore, the assertions regarding lack of clarity in the procedure laid down by the LFCE ignore the details of the procedure followed in the Commission, not to mention the fact that the LFCE is based on the principle of "due process" set out in articles 14 and 16 of the Constitution. Thus the essential formalities for each process are respected, together with the individual guarantees enjoyed by each individual, who in turn has access to remedies by means of which he or she can challenge the decisions of the Commission. For these reasons, we request the deletion of the reference in question from the report.

Notes

1/ Actions such as discriminatory and predatory pricing are analysed under this point.

2/ See "Competition policy and vertical restraints: franchising agreements", OECD, Paris, 1994.

3/ Particular emphasis under this heading is given to discriminatory pricing in sections 1 and 3 of the Robinson-Patman Act (RPA), predatory pricing in section 2 of the Sherman Act, section 5 of the Federal Trade Commission Act (FTCA) and section 3 of the RPA, as well as section 50 (1) (c) of the Canadian Competition Act (CA), and exclusive dealing and distribution in section 5 of the FTCA and sections 77 (2) and 77 (3) of the CA.

4/ Javier Aguilar Álvarez (member of the Commission): "Análisis constitucional de la Ley Federal de Competencia Económica", see Informe de Competencia Económica Segundo Semestre de 1996 (Report on economic competition for the second half of 1996), Federal Commission on Competition.

5/ The essential formalities in the procedure are those which guarantee appropriate and timely defence prior to the prohibition. See Pleno, Gaceta del Semanario Judicial de la Federación, Época: 8A. Número: 53, May 1992. Tesis: P LV/92. Page: 34.

6/ Op. cit., p. 83.

7/ To date, none of these authorities has ruled the LFCE unconstitutional. Idem, p. 83.

8/ See the statistical appendix to the Report on economic competition for the second half of 1996, Federal Commission on Competition, Mexico City, 1997, pp. 165 and 168. The cases in question do not include inquiries and cases pending on 31 December 1996.

9/ See Statistical appendix, ibid.